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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 213

SOUTHERN PACIFIC COMPANY
(a corporation),
Petitioner,

vs.

GLADYS VIOLA HAIGHT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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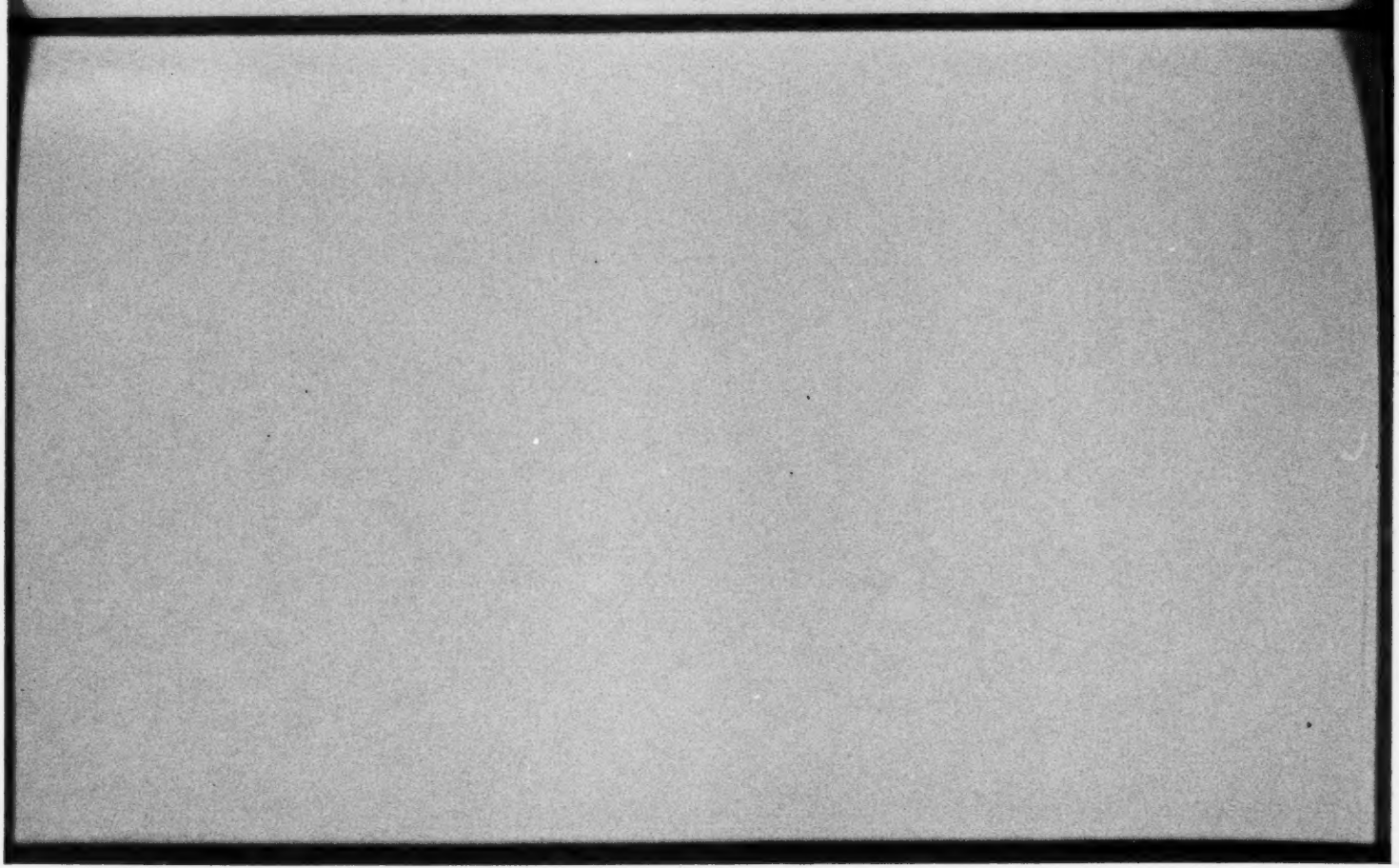

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PETITION FOR WRIT OF CERTIORARI
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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY OF STATEMENT OF MATTERS INVOLVED.

This is an action originally commenced by respondent (a citizen and resident of the State of California)

in the Superior Court of the State of California, in and for the County of Siskiyou, against the defendants, Southern Pacific Company, petitioner herein (a corporation organized under the laws of Kentucky), and two members of a crew of its train sued under fictitious names (crew members being residents and citizens of California), whereby plaintiff sought to recover damages for injuries sustained in an accident occurring at an intersection of railroad tracks and a public highway in the vicinity of Dorris, California, when the automobile in which respondent was riding as a guest struck a car of a freight train owned and operated by the Southern Pacific Company, while said train was slowly moving over said highway intersection. When said case was called for trial in said California Superior Court, the respondent elected to proceed to trial against the non-resident defendant Southern Pacific Company alone (the resident defendants not having been served or appeared). The case was then and there removed to the United States District Court, in and for the Northern Division of the Northern District of California.[1] In the trial before the United States District Court the jury returned a verdict for respondent in the sum of $18,500.00 and judgment in that sum was entered in respondent's favor.

The respondent's complaint charges that the collision and injuries were caused by the negligence of the defendants in failing to maintain at said intersection a

[1]The removability of said cause to the United States District Court was approved in the opinion of the Circuit Court of Appeals. (R. 560 to 572.)

flagman or electric bell, light or gate or other mechanical warning signal to warn or notify motorists crossing said railroad tracks of the presence of trains or cars upon said tracks.

The collision occurred under the following circumstances:

On the evening of March 6, 1935, and shortly before the accident, the respondent as a guest passenger with her two companions arrived in a Ford coupe at a private home in Dorris, during a light snowfall, for the purpose of an evening's entertainment. The entertainment failed to materialize and the parties (8:45 P. M.) decided to drive to Klamath Falls, Oregon (a distance of 26 miles) to attend a motion picture theatre. As they started to drive from the residence, which was distant approximately 2370 feet from the railroad crossing (Map, Defendant's Exhibit "A"), the snowfall increased to such extent as to decrease the visibility to 15 to 20 feet (R. 118, 154, 230), or, as respondent admitted, 12 to 14 feet. (R. 251.) The automobile proceeded to the crossing at a constant rate of speed between 10 and 15 miles per hour. (R. 119, 154, 230.) The respondent testified that they did not see the train through the headlights of the car in which they were riding until they were about 12 to 14 feet from it. (R. 251.) The eastbound automobile collided with the slowly moving train, at a time when the engine of the southbound train was at a point 1760 feet south of the crossing and the rear end of the caboose 1557 feet north of the crossing. The crossing was protected by two standard, wooden cross-arm signs. The one on the west side of the track was on

the north side of the highway approximately 4½ feet from the edge of the graveled (traveled) shoulder of the highway (R. 47, 46), and the one on the east side was approximately the same distance from the traveled shoulder but on the south side of the highway. There were no lights, wig-wag or other form of automatic or mechanical signals at the crossing at the time. The crossing was an open country crossing with no obstructions to view, no buildings in and about said crossing, and a view of 1800 feet and more could be had down the track on each side of the highway crossing. There was no travel upon the highway except respondent's automobile. The respondent and her companions (being residents of the town of Dorris) knew the exact location of the crossing, and had been over it many times both day and night (R. 138, 139, 243) and, further, knew that there were no lights, wig-wag or other mechanical warning devices at said crossing. (R. 157, 242, 243.) As they were approaching the crossing, respondent and her companions had located themselves and knew the crossing was a short distance ahead of them (R. 243, 259), and the respondent admitted that she was uneasy for she could not see very far and she knew the crossing was in front of her. (R. 247.)

Defendant's motion for a directed verdict was denied (R. 477) and the Court, in submitting the case to the jury, instructed the jury that they could not find the defendant negligent in failing to regularly maintain any human or automatic flagman or any light, bell, gate or mechanical signal at said crossing, since said crossing was not under ordinary circumstances more than ordinarily dangerous. (R. 488.) However,

the Court did instruct the jury that if they found that said snowstorm would require some sort of signal or warning of the presence of said train at said crossing, then the crew of said train was required to give this protection by providing a flagman or some other means of warning to travelers of the presence of their train. (R. 490.)[2] The Court further instructed the jury that if they found that the defendant violated SubdivisionV of General Order 75-A of the Railroad Commission[3] "*at the time and place of this accident* in failing to locate its crossing sign in a conspicuous position facing highway travel", then the jury could find the defendant negligent. (R. 489.) Motion for judgment in favor of the defendant, pursuant to Rule 50B of the Rules of Civil Procedure and in the alternative motion for new trial were made and denied. (R. 31, 37.) The Circuit Court of Appeals affirmed the judgment of the lower Court upon a divided Court, Honorable Bert Emory Haney filing a dissenting opinion (R. 587), contending for a reversal of the lower Court on the ground that there was no proof of any negligence on the part of the defendant, and in so contending stated that "the majority opinion is based on a misconception of, and refusal to apply the California law", and "in addition, the majority does not consider some of the facts and questions presented". (R. 587, 588.)

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[2]No negligence of the train crew in this regard was proven in that the evidence showed that the crew had no opportunity to reach the crossing and provide protection for the same from the time the heavy snowstorm commenced to the time of the accident, a period of about 2 minutes, or the time it would have taken the respondent's automobile to travel 2370 feet at 10 to 15 miles per hour. (See *Bowers v. Great Northern Railway Co.*, 295 N. W. 99, 99 A. L. R. 1443; *Driskell v. Powell*, 67 Fed. (2d) 484.)

[3]Said General Order is set forth in the Appendix hereto.

JURISDICTION.

The date of the judgment of the Circuit Court of Appeals to be reviewed is April 2, 1942 (R. 599) which, with the Court's opinion, is reported in 126 Fed. (2d) 900. (R. 560 to 599.) Within time (Rule 25, Rules of the United States Circuit Court of Appeals for the Ninth Circuit) petitioner applied for a rehearing by said Circuit Court of Appeals, which was denied on May 16, 1942. (R. 600.) The judgment sought to be reviewed thus became final.

The jurisdiction of the trial Court, the United States District Court in and for the Northern Division of the Northern District of California, was founded upon Judicial Code Section 28 Amended, Title 28 USCA § 71. The cases believed to sustain the jurisdiction of said District Court and the removability of said cause from the state Court are *Powers v. Chesapeake etc. R. Co.*, 169 U. S. 92, and *Berry v. St. Louis & S. F. R. R. Co.*, 118 Fed. 911. The statutory provisions under which jurisdiction of this Court is invoked is the Judicial Code Section 240(a) Amended, 28 USCA § 347. The cases believed to sustain the jurisdiction of this Court to review decisions of the Circuit Court of Appeals are: *Erie Railroad Co. v. Tompkins*, 304 U. S. 64; *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 206, and *Buffum v. Peter Barceloux Co.*, 289 U. S. 227.

THE QUESTIONS PRESENTED.

The principal questions involved are as follows:

1. Whether, under the law of the State of California, there was a duty upon a railroad company to

provide a flagman, red flares or some other means of warning to travelers that a train is being operated over a highway crossing, when inclement weather was prevailing, and whether, under said state law, after a train reaches the crossing the duty of the flagman or other warning device ends as to that train.

2. Whether, under the law of the State of California, railroad companies are obligated to maintain devices to warn travelers on the highway of the presence of a railroad crossing, in such a manner that such warnings are actually effective and visible to travelers under all anticipated weather conditions.

3. Whether, under the law of the State of California, railroad companies are under the duty to effectively advise travelers, who knew of the existence and location of the railroad crossing and who also appreciated at the time that they were approaching said crossing, that a railroad crossing is located in the vicinity.

4. Whether, under a General Order of the Railroad Commission of the State of California,[4] railroad companies are obligated to maintain a wooden railroad crossing sign in such a position and in such a manner that the same is visible to the traveler when the latter's vision is limited by a snowstorm to but 13 feet.

The foregoing questions were involved and were decided by the Circuit Court of Appeals to the prejudice of petitioner (appellant below) and thereupon the petitioner petitioned the Circuit Court of Appeals for a rehearing and reargument to correct assigned errors

[4]Said General Order is set forth in the Appendix.

in its decision. The petition for rehearing was denied. (R. 600.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided important questions of local law in a way in conflict with applicable local decisions in this:

(a) That the Circuit Court of Appeals by its decision refused to follow the applicable decision of the Appellate Court of the State of California[5] in holding that railroad companies must effectively warn the traveling public of the presence of trains which are then and there being operated or moving over highway crossings;

(b) That in holding that the railroad companies are obligated to maintain crossing signs or other devices at a crossing to warn or notify the traveling public of the presence of a railroad crossing, in such manner that such warnings are actually effective and visible to travelers during the existence of heavy snowstorms, fog or other inclement weather conditions, and in so holding said Circuit Court of Appeals misconstrued and misapplied an inapplicable decision of an Appellate Court of California[6] and erroneously

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[5] *Dunlap v. Pacific Electric Ry. Co.*, 12 Cal. App. (2d) 475, 55 Pac. (2d) 894, which holds under similar weather conditions that when a moving train reaches a crossing the duty of the flagman or other warning device ends as to that train, as the train itself is a sufficient warning and the railroad company can presume that automobiles bearing sufficient headlights would not crash into a moving train.

[6] *Harper v. Northwestern Pacific R. Co.*, 34 Cal. App. (2d) 451, 93 Pac. (2d) 821.

deemed such decision to modify the controlling decision of said California Court.

(c) That in holding that the railroad company owed a duty to effectively advise a traveler of the location of the railroad crossing, when such traveler knew of the location of said crossing and also appreciated at the time that she was approaching said crossing.

(d) That in holding that the General Order of the Railroad Commission of the State of California provides that the crossing sign must be placed on either side of the railroad crossing in such a position that said sign can be seen when the traveler's vision is limited by a snowstorm to but 13 feet, and by so holding the Circuit Court of Appeals has placed an untenable construction upon such General Order and thereby created a duty upon railroad companies generally which is impossible of performance.

2. The Circuit Court of Appeals has decided important questions of local law in a way in conflict with state law as yet unannounced by the highest Court of the state (the Supreme Court), in holding that a decision of a District Court of Appeal[7] overruled and modified the decision of another District Court of Appeal of the State of California,[8] when the highest Court of said state (Supreme Court) had denied a petition for transfer and hearing in the former case.[9]

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[7]*Harper v. Northwestern Pacific R. Co., supra.*

[8]*Dunlap v. Pacific Electric Ry. Co., supra.*

[9]Under the Rules of the Supreme Court of California, Rule XXX, Section 6 (see Appendix), one of the grounds necessary to obtain a hearing therein of decisions of a District Court of Appeal is that such hearing is necessary to secure uniformity of decision, and hence it is reasonable to assume that the Supreme Court in

3. The Circuit Court of Appeals in construing a General Order of the Railroad Commision, which provides that a crossing sign must be maintained at each railroad-highway crossing in a conspicuous position, to mean that such sign must be maintained in the most conspicuous position under the most adverse weather conditions (a matter which has not been before the Supreme Court of the State of California, or any other Appellate Court in said state) adopted a construction which is untenable and in conflict with applicable decisions of other jurisdictions.

BRIEF.

A brief in support of petition is filed herewith.

PRAYER.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Honorable Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings in said case numbered and entitled in said Court No. 9775, Southern Pacific Company, a corporation, appellant, v. Gladys Viola

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denying the petition in the *Harper Case* determined that there was no conflict between it and the *Dunlap Case*, but, as Judge Haney pointed out in the dissenting opinion in the instant case, the *Harper Case* involved additional conditions not present in the *Dunlap Case*.

Haight, appellee, to the end that said case may be reviewed and determined by this Court as provided by law and that said judgment of said United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet, just and proper.

Dated, Sacramento, California,
July 1, 1942.

GEORGE R. FREEMAN,
WILLIAM H. DEVLIN,
A. I. DIEPENBROCK,
HORACE B. WULFF,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY MATTER.

The petition makes reference to the judgment below, states the jurisdictional grounds and states the facts, which statements are adopted.

SPECIFICATION OF ERRORS.

We believe that the Court erred as follows:

(1) In failing to hold to and follow the law of the State of California that railroad companies, in the

reasonable management of their trains, which are rightfully upon a crossing, are not chargeable with knowledge that when inclement weather conditions prevail an automobile bearing sufficient headlights was nevertheless likely to crash into a moving train unless warning devices or a flagman with a lighted lantern was stationed in the highway, and that after the train reaches the crossing the duty of the flagman or other warning device ends as to that train;

(2) In holding that if the cross-arm sign maintained by a railroad company at a highway crossing would not be visible in a snowstorm not unusual in the vicinity, then it cannot rely upon the maintenance of the cross-arm as a full discharge of its duty to warn highway users of the presence of its railroad crossing and the dangers incident thereto, but must provide such other and further warnings as would be an effective warning under such circumstances;

(3) In holding that the railroad company was negligent in operating its trains over highway crossings in the open country and during snowstorms, fog or other inclement weather conditions, when it fails to give effective notice of the location of such crossing to travelers who knew and anticipated the existence and location of such crossing;

(4) In holding that the petitioner violated General Order 75-A of the Railroad Commission of the State of California in failing to locate a crossing sign in such a position that it would be conspicuous and visible during a heavy snowstorm, which limits vision to but 12 to 14 feet.

SUMMARY OF THE ARGUMENT.

(1) No duty under California law to maintain at country crossing any warning device other than the standard crossing sign (during in the existence of inclement weather) for the purpose of notifying travelers of the existence of such crossing and particularly where such travelers knew of the location of the railroad crossing, and appreciated that they were approaching such crossing.

(2) No violation of General Order 75-A of the Railroad Commission of the State of California.

ARGUMENT.

(1) NO DUTY UNDER CALIFORNIA LAW TO MAINTAIN AT COUNTRY CROSSING ANY WARNING DEVICE OTHER THAN THE STANDARD CROSSING SIGN (DURING THE EXISTENCE OF INCLEMENT WEATHER) FOR THE PURPOSE OF NOTIFYING TRAVELERS OF THE EXISTENCE OF SUCH CROSSING, AND PARTICULARLY WHERE SUCH TRAVELERS KNEW OF THE LOCATION OF THE RAILROAD CROSSING, AND APPRECIATED THAT THEY WERE APPROACHING SUCH CROSSING.

The state of facts involved in the instant case is not one where the train runs into an automobile at a highway-railroad crossing, nor is it one where a train is occupying a crossing in violation of the statute or ordinance or for an unreasonable length of time, nor is it one where the view of crossing signs was obscured by building, other cars, brush or trees, but the state of facts involved is one where an automobile in which respondent was riding crashed into the side of a train while the latter was slowly moving over a highway

crossing, which accident occurred at a time when a snowstorm was prevailing, and when all of the occupants of the automobile knew and appreciated that they were approaching a railroad crossing. Under such circumstances, the Appellate Court of the State of California held in *Dunlap v. Pacific Electric Ry. Co.*, 12 Cal. App. (2d) 473 (55 Pac. (2d) 894), that there was no duty upon a railroad company to provide a flagman, red flares or some other means of warning to travelers that a train is being operated over the intersection, when inclement weather was prevailing, for the reason that railway companies, through their agents, in the reasonable management of their trains which are rightfully upon a crossing, are not chargeable with knowledge that an automobile, bearing headlights of sufficient power to enable the driver to avoid an obstruction in the road, was nevertheless likely to crash into a moving train unless a signal or a flagman with lighted lantern was stationed in the highway.

In the *Dunlap Case, supra,* an automobile, in which a guest was riding, ran into a moving train on a crossing when the fog was so thick at times that the occupants could barely see at all and at other times when they could see but 15 or 20 feet ahead. The majority opinion of the Circuit Court of Appeals recognized that if this case controlled it would be their duty to hold for the defendant in the instant case, but the Circuit Court of Appeals erroneously deemed the *Dunlap Case, supra,* as having been modified by a subsequent decision of an Appellate Court of California, and accordingly held that under California law if the defendant in the exercise of due care should have

known that the cross-arm sign maintained by it would not be visible in a snowstorm not unusual to the vicinity, then it cannot rely on the maintenance of the cross-arm as a full discharge of its duty to warn the highway user (a frequent user of the crossing) of the presence of its railroad crossing. The case referred to was *Harper v. Northwestern Pacific R. R. Co.,* 34 Cal. App. (2d) 451 (43 Pac. (2d) 821). In the last mentioned case the driver of an automobile—a stranger to the vicinity—was approaching (in a 45 mile per hour zone) an unknown spur track and collided with a standing train then blocking the crossing. The traveler had no warning of the presence of the spur track for the reason that the railroad company had permitted the crossing sign located in a conspicuous place to become so obscured by brush and trees that such sign could not be seen even on a sunshiny day. There was no inclement weather condition involved, as the accident occurred on a clear July night in California. The Court held that the defendant was negligent in permitting the crossing sign to become obscured by trees and other growths so it could not be seen by a traveler. Said Court also disposed of the contention that the presence of the cars across the highway constituted a sufficient notice of such crossing, irrespective of the obscured crossing sign, by stating:

> "For the presence of a car across a highway to constitute notice of such an obstruction, we must presuppose that its presence could have been known to or anticipated by a person of reasonable prudence. * * * It is only when one observes, or by the exercise of reasonable care should have observed, a railroad track, or *when one knows that*

> *it is in a particular place and identifies the locality, that it becomes a warning of danger.* * * * Here was not the situation *of a moving car upon a crossing,* or standing upon a lighted street, *or whether the existence of the spur was known to the decedent, but here where the presence of the spur itself was unknown to the driver of the car, a white cross-arm might have been seen where a dark box car would not."* (Italics ours.)

The doctrine announced in that case is that where the railroad crossing sign is placed in a position which would be in compliance with the order of the Railroad Commission, but was actually permitted by the railroad company to be so obscured by trees and brush that it could not be seen by approaching highway travelers, then the railroad company failed to perform the duty prescribed by General Order 75-A of the Railroad Commission.[10] Said case should really be treated as one in which no sign was present at all. The facts in the instant case distinguish the case from the *Harper Case, supra,* in this, the train was moving over the crossing, the existence and proximity of the crossing were known to the respondent and the driver, and although a white cross-arm might not have been seen through the snow, a dark box car would have been, and was seen.[11]

In the *Harper Case, supra,* the Court confirming existing California law that the railroad track of a

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[10]Said General Order is set forth in the Appendix.

[11]Respondent admitted that she saw the train within 13 feet or within the maximum length of her vision (R. 251) but did not see the cross-arm sign which was located but 4½ feet off the paved shoulder of the highway.

steam railroad must itself be regarded as a sign of danger by all travelers who knew or should in reason have known that they were approaching a railroad crossing. The track itself is a warning to all travelers except a stranger upon a highway over which, unknown to him, a railroad track crosses, which track is obscured and where there is nothing to indicate its presence or to warn him of its existence.[12] The *Harper Case,* which was premised upon the circumstances that the driver of the car, a stranger to the community, did not know he was approaching a railroad track and the track was obscured by darkness and no crossing sign was effectively maintained to warn him of its existence, was erroneously applied by the Circuit Court of Appeals to the instant case where the driver, respondent and the other occupant of the car had been over the crossing many times, knew of its existence and its location, and on approaching the crossing on the night of the accident appreciated that they were approaching such railroad crossing, and where a properly placed crossing sign was temporarily obscured by a snowstorm.

The holding of the Circuit Court of Appeals unwarrantly extends the doctrine of the *Harper Case* from cases where the crossing sign becomes obscure through the railroad company's negligence in permitting trees

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[12] *Koster v. Southern Pacific Co.*, 207 Cal. 753 (279 Pac. 788);
Gregoriev v. Northwestern Pacific R. R. Co., 95 Cal. App. 428 (273 Pac. 76);
Lawrence v. Southern Pacific Co., 189 Cal. 434 (208 Pac. 966);
Rosenbloom v. Southern Pacific Co., 59 Cal. App. 102 (210 Pac. 53).

and brush to hide the sign from the view of travelers, to a case where the sign is rendered obscure by inclement weather conditions. In other words, under the holding in the instant case the railroad company is now made responsible for an act of God (snowstorm), a matter beyond the railroad's control, for, as stated in *Driskell v. Powell,* 67 Fed. (2d) 484, at page 485:

> "For the fog itself, the defendant was not responsible."

The *Harper Case* does not involve the effect of inclement weather and the case of *Dunlap v. Pacific Electric Ry. Co., supra,* expressly declares that there is no duty to give additional warnings under similar weather conditions as prevailed in the instant case.

Reference is made to *Reines v. Chicago, M. St. P. & R. Co.* (Supreme Court, Washington), 80 Pac. (2d) 406, where the Court took pains to examine 75 cases on this subject and a review of that case will show that the holding of the Court below is not only contrary to the California law but to the law set forth in 58 cases of 27 different jurisdictions.

The Court in the *Harper case, supra,* expressly distinguishes the *Dunlap Case* from the *Harper Case,* because the cases are different on their facts. A holding that the *Harper Case* modifies the doctrine of the *Dunlap Case* is contrary to the express statement in the former case.

The view of Judge Haney in his dissenting opinion in the instant case that the *Harper Case* does not modify the decision in the *Dunlap Case* is supported

by the fact that the highest Court in California (Supreme Court) has, in effect, held that there is no conflict between the *Dunlap* and *Harper Cases*. We make this statement because the Supreme Court of California denied a petition seeking the transfer of the *Harper Case* to that Court and a hearing there, and it is reasonable to assume that the Supreme Court deemed that no conflict existed, as otherwise the Supreme Court could hardly have denied such petition and permitted the law on such an important question to remain in conflict and confusion. (Rule XXX, Sec. 6, Rules of the Supreme Court of California.)[13] Hence the decision in the instant case is probably in conflict with the state law as yet unannounced by the highest Court of that state. (*Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 206.)

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(2) NO VIOLATION OF GENERAL ORDER 75-A OF THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

The Railroad Commission of the State of California has exclusive power to determine and prescribe the manner, the terms of installation, operation, maintenance, use and protection of each crossing of a publicly used road or highway by a railroad. (Act 6386, General Laws of the State of California, Section 43(b), Statutes of California, 1933, page 2227.)[14] Pursuant to such authority the Railroad Commission issued General Order 75-A. Said General Order provided that one crossing sign be maintained at each crossing, and

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[13]Said rule is set forth in the Appendix.
[14]Above statute is set forth in Appendix.

be constructed and installed in accordance with specifications and be located in a conspicuous position facing highway travel. The provision does not require two signs, as said order provides for at least one sign to be located *"at either corner of the crossing intersection"*. All of the provisions of said order were complied with in the case at bar, as the signs were located in a conspicuous position which could be seen under all conditions for the full length of the traveler's vision, and the sign was facing highway travel. The trial Court erroneously instructed the jury:

> "If you find that the defendant company violated the above rule *at the time and place of this accident* in failing to locate its crossing sign in a conspicuous position facing highway travel and if you find that such violation if any was the proximate cause of the accident, I instruct you that the defendant company was guilty of negligence." (R. 489.)

Said instruction permitted the jury to determine whether or not the crossing sign was in a conspicuous place at the time of the accident, that is, during the existence of a snowstorm. The majority opinion of the Circuit Court of Appeals held such instruction was proper for the reason that the phrase "in a conspicuous position" means the sign must be visible under all weather conditions that can be anticipated. The Court by such construction has declared a duty to exist, which is impossible of performance. The Railroad Commission must have anticipated the presence of snow, fog and other types of prevailing inclement weather in California at the time said General Order

was adopted, and, further, must have appreciated that a wooden sign could not be seen when the traveler's view was limited by such conditions. Hence, the Commission's failure to require lights or other devices upon such crossing sign is decisive that said Order did not require the sign to be conspicuous and visible during fog or snowstorms. The word "conspicuous" (according to the Century Dictionary) means "open to view; catching the eye; easy to be seen". Things can be conspicuous, more conspicuous, or most conspicuous. Said General Order does not provide that said crossing sign must be placed in the most conspicuous place, nor does it leave room for any comparison whatever. It might be conspicuous if it were placed in any one of twenty different possible locations. To require a railroad company to place its signs in the most conspicuous place under the most adverse conditions that may prevail is placing an unwarranted and impossible construction on said General Order. California Courts have not constructed this or similar orders or statutes, but the same have been considered in other jurisdictions.

In *Baltimore & O. R. Co. v. Reeves,* 10 Fed. (2d) 329 (C.C.A. 6), the Court stated on page 732:

> "Nor does the lack of crossing sign bring damage, if the fog is too dense to see it, or if the traveler then knows the crossing is there."

In *Fields v. Chicago B. & Q. Ry. Co.,* 14 Fed. 332 at 335, the Court stated:

> "Thus a sign, if it existed, could give no warning to a blind man * * * nor if the sign were present it could not be seen (pitch darkness)."

The order did not provide that the sign must be seen under all circumstances for the further reason that the order requires but one sign at a crossing, and when a freight train is occupying a crossing, necessarily the sign is not visible to a traveler approaching from the side of the track opposite to the sign.[15] Further, the fact that the crossing sign was rendered invisible by the snowstorm or even the absence of the crossing sign, cannot be the proximate cause of the accident to a traveler like the respondent who knew of the presence and location of the crossing, for the crossing sign is installed solely to advise travelers of the presence of the crossing, and if the presence of the crossing is known to the traveler the silent sign cannot advise him of something he already knew.[16] Further, the track itself, under California law, is ample warning to all travelers who knew the presence and location of the crossing.

It is common knowledge that there are thousands of public and private crossings in California, and, further, that throughout California, as well as other states, weather conditions exist from time to time which reduce the visibility of an automobile driver to

---

[15]In *Yardley v. Rutland R. Co.*, 153 Atl. 195 at 198, the Court held:

"The fact that the train hid the warning sign from Yardley's view is immaterial."

[16]Authorities on this question are reviewed in 93 A. L. R. 218. See particularly the following:

Gulf, etc. R. Co. v. Holifield, 120 So. 750;
Gallagher v. Montpelier & Wells River R. Co., 137 Atl. 207;
New York R. Co. v. Bowles, 171 N. E. 844, 846;
Missouri Pacific R. Co. v. Price, 33 S. W. (2d) 366;
Morley v. Cleveland, etc. R. Co., 194 N. E. 406;
Texas & N. O. R. Co. v. Stratton, 74 S. W. (2d) 464.

very short distances. Such conditions are to be expected on occasions, but they occur very rarely, and perhaps not more than two or three occasions at any particular crossing during a year's time. Naturally, such infrequent occasions do present conditions of unusual danger, but the Court in its opinion holds that it is the responsibility of the railroad company alone to guard against such dangerous conditions, and frees the automobile traveler from any corresponding duty. How then is it proposed that this new duty shall be fulfilled? No signal could be devised which would be a sufficient and effective warning under all circumstances, through snow, fog or smudge. Where would the railroad company procure sufficient flagmen to be stationed at each side of each crossing affected by such conditions in advance of each train operating thereover? How or in what manner could the petitioner have protected this crossing when the heavy snowstorm commenced but two minutes prior to this accident?[17]

Since the petitioner operates in seven states, the performance of this duty in California would so greatly impair the movement and operation of its trains as to render its interstate transportation ineffective, and this is particularly true during this period of emergency when the movement of war materials and men is so imperative.

---

[17]In *Bowers v. Great Northern Railway Company*, 295 N. W. 99, and *Driskell v. Powell*, 67 Fed. (2d) 484, it was held that if not sufficient time has elapsed since the train stopped to the time of the accident for the crew to discover and guard against the extraordinary local condition complained of there was no breach of any duty.

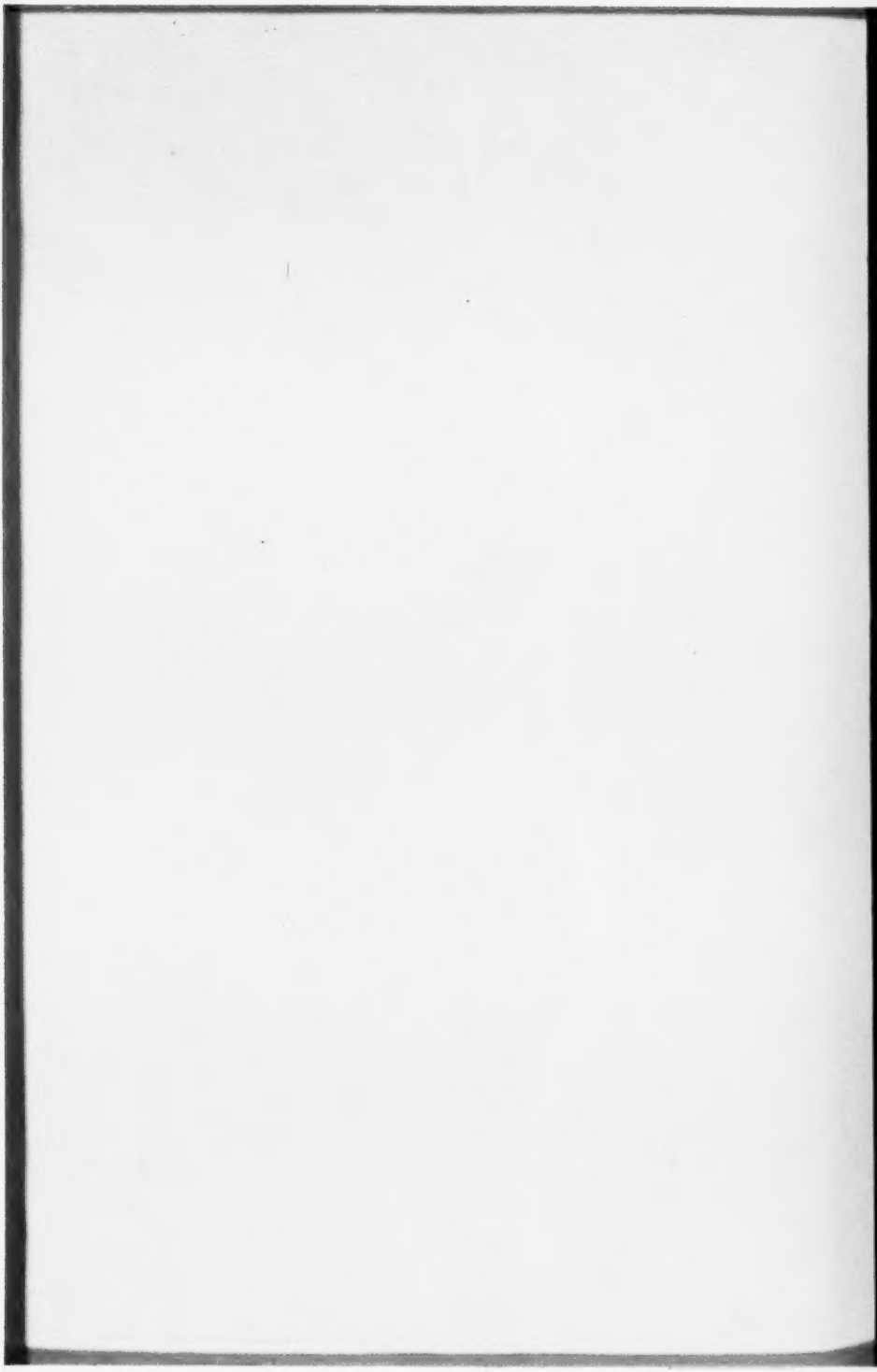
CONCLUSION.

The Court below has misconstrued and misapplied the law of the State of California in a manner to create a new duty upon railroad companies, which would create such a hardship upon railroads generally, and which is so difficult, if not impossible, of performance, that the case is one calling for the exercise by this Court of its supervisory powers, in order that the proper construction of the law of California may be had, and that the conflict mentioned herein between the instant case and the cases of the Appellate Courts of California be removed, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Dated, Sacramento, California,
July 1, 1942.

Respectfully submitted,
GEORGE R. FREEMAN,
WILLIAM H. DEVLIN,
A. I. DIEPENBROCK,
HORACE B. WULFF,
Counsel for Petitioner.

(Appendix Follows.)



Appendix

GENERAL ORDER No. 75-A

(Superseding G. O. No. 75 and Supplements 1 and 2 thereto)

Railroad Commission of the State of California

REGULATIONS GOVERNING THE PROTECTION OF CROSSINGS AT GRADE OF ROADS, HIGHWAYS AND STREETS WITH RAILROADS OR STREET RAILROADS IN THE STATE OF CALIFORNIA.

Issued under authority of Public Utilities Act.
Approved December 5, 1932.
Effective January 1, 1933.

IT IS HEREBY ORDERED by the Railroad Commission of the State of California that the following regulations governing the protection of street, road and highway crossings with railroads and portions of street railroads be observed in this State unless otherwise authorized or directed by the Commission.

I. *Purpose of Rules.*

The purpose of these rules is to formulate, for the State of California, uniform standards for grade crossing protection, the application of which will insure greater safety to the public using grade crossings.

II. *Scope of Rules.*

These rules are not intended as complete construction specifications but embody only the requirements which are most important from the standpoint of public safety. Construction shall be according to accepted good practice for the given local conditions in all particulars not specified in the rules.

III. *Identification of Public Crossings.*

Unless otherwise specified by this Commission, each carrier shall paint or otherwise maintain on the crossing sign post or other structure at each public crossing of its track, an identification number, preceded by the words "Crossing No." except at crossings of named streets within incorporated cities where the carrier is not required to maintain a Standard No. 1 crossing sign, or other special types of signs or crossing signals supported by posts, pedestals or foundations, or crossing gates, provided that this Commission shall have assigned such identification number and shall have notified the carrier thereof. Such number shall be placed so as to be readily legible from the highway. In all matters pertaining to any crossing brought to the attention of the Commission, reference shall be given to the assigned crossing number.

* * * * * * *

V. *Crossing Signs.*

(a) Each public crossing at grade of a road, highway or street with a track of a railroad or of a street railroad, as outlined in Section X hereof, shall,

unless exemption is provided for herein, be protected by at least one crossing sign, constructed and installed in substantial conformity with the specifications herein illustrated and designated as Standard No. 1, provided, however, that crossings where crossing gates are operated continuously or where two or more crossing signals are maintained, no crossing sign shall be maintained.

(b) Each crossing sign (Standard No. 1) herein illustrated shall be located in a conspicuous position facing highway travel, preferably *at either corner* of the crossing intersection on the right-hand side of the highway traffic flow and in advance of the railroad track.

* * * * * * *

VI. *Automatic Crossing Signals.*

(a) All automatic signals installed at a public crossing at grade of a street, road or highway with the track of a railroad or street railroad, shall substantially conform to the specifications herein illustrated and designated as Standard No. 3, No. 4, No. 5 or No. 6.

(b) A distinctive warning aspect may be used at crossings having more than one main track, to indicate the approach of another train, when a warning aspect is being displayed for the first train, provided, however, that the type of such distinctive warning aspect shall have been approved by this Commission.

(c) Crossing signals shall, unless the Commission otherwise directs, be located in a conspicuous position

at both corners of the crossing intersection on the right-hand side of highway traffic flow and in advance of the railroad track and arranged to face the highway travel. Signals may, however, be installed in the center of the street and in advance of the track, with the consent of the Commission. This Section of the Order will not be retroactive with respect to crossings provided with automatic signals as of the effective date of the Order until signals at such location are replaced, except when replacement is due to accident.

* * * * * * *

This order shall be effective on and after the first day of January, 1933.

Approved and dated at San Francisco, California, this fifth day of December, 1932.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
By H. G. MATHEWSON, Secretary.

RULES FOR SUPREME COURT AND DISTRICT COURTS OF APPEAL.

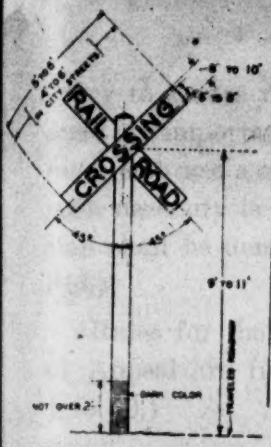
RULE XXX.

APPLICATIONS FOR REHEARING, AND HEARING AFTER DECISION.

* * * * * * *

Sec. 6. Petitions for hearing in the Supreme Court after decision by the District Courts of Appeal will be granted only when it shall appear necessary in

(The following is a photostat copy of Specifications of Standard No. 1, No. 2 and No. 3 attached to the foregoing General Order)

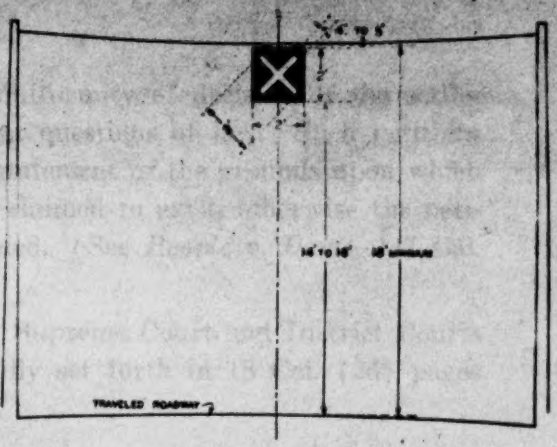


STANDARD NO. 1

Painting:

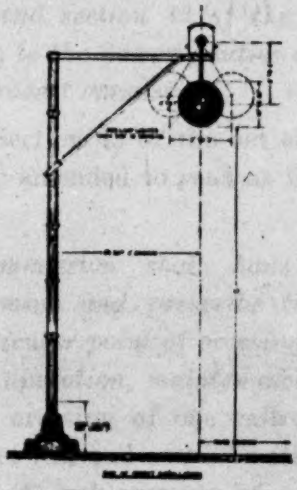
Post and Arms: White or Aluminum, except that post may be of a dark color for not over two (2) feet above ground line.

Lettering: Black—width of stroke 1" to 1¾".



STANDARD NO. 2

Painting:
Field: Black.
Letter: White.



STANDARD NO. 3

Wigwag—Side of street installation.

Painting:

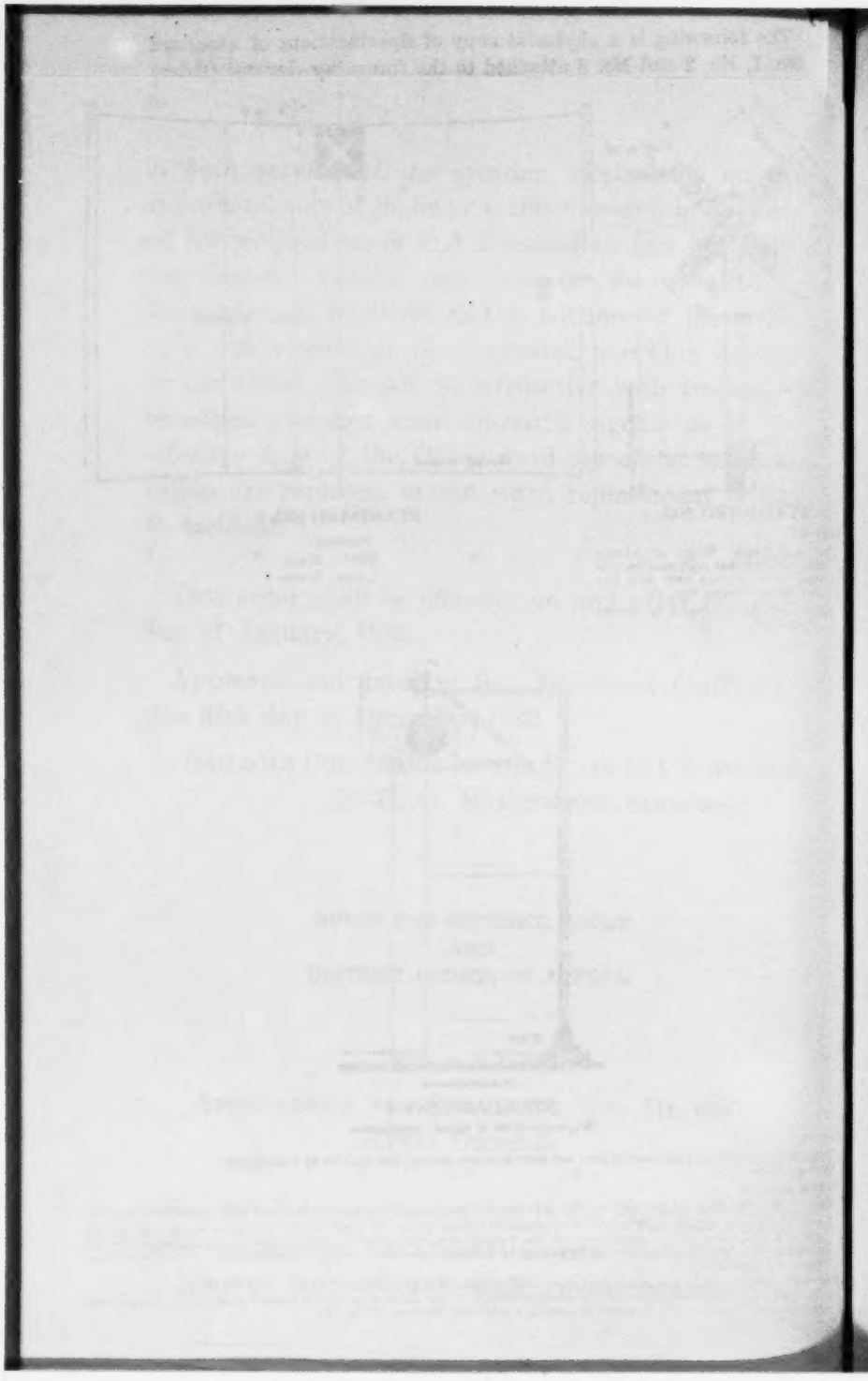
Post: White or Aluminum, except that not over 2' above ground line may be of a dark color.
Banner: Vermilion.

Warning Aspect:

Cycles: Min. 30, Max. 45 per minute. The movement from one extreme to the other and back constitutes a cycle.

Signals: Warning aspect shall consist of a swinging banner by day in combination with a swinging red light at night. Unless omitted by permission of the Commission, the warning aspect shall be accompanied by the sounding of a bell. Both banner and light shall be so constructed as to display a danger signal in both directions along the highway.

Note: In a curbed street, the supporting post shall be placed near curb line.
The distance from the surface of the paved roadway to the lower edge of the banner shall be 12', except that this distance may, where justified by special conditions, be from 11' to 14'.



order to secure uniformity of decision or the settlement of important questions of law. Such petitions must embrace a statement of the grounds upon which such necessity is claimed to exist, otherwise the petition shall be denied. (See *People v. Davis,* 147 Cal. 346.)

(Rules for the Supreme Court and District Courts of Appeal are fully set forth in 18 Cal. (2d) pages 1 to 30.)

STATUTES OF CALIFORNIA, 1933, CHAPTER 855.
(Statutes 1933, page 2227.)

"An act to amend section 43 of the public utilities act, relating to the powers, duties and jurisdiction of the Railroad Commission.

SECTION 1. Section 43 of the act cited in the title hereof is hereby amended to read as follows:

43. * * *

(b) *The commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection* of each crossing of one railroad by another railroad or street railroad and of a street railroad by a railroad, and of *each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of section 2694 of the Political Code so far as applicable,* and to alter, relocate or abolish by physical closing any such crossing here-

tofore or hereafter established, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, municipality or other political subdivision affected * * *"

Office - Supreme Court, U.
FILED
AUG 21 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

October Term, 1942

No. 213

Southern Pacific Company
(a corporation),
Petitioner,

vs.

Gladys Viola Haight,
Respondent.

BRIEF FOR RESPONDENT.

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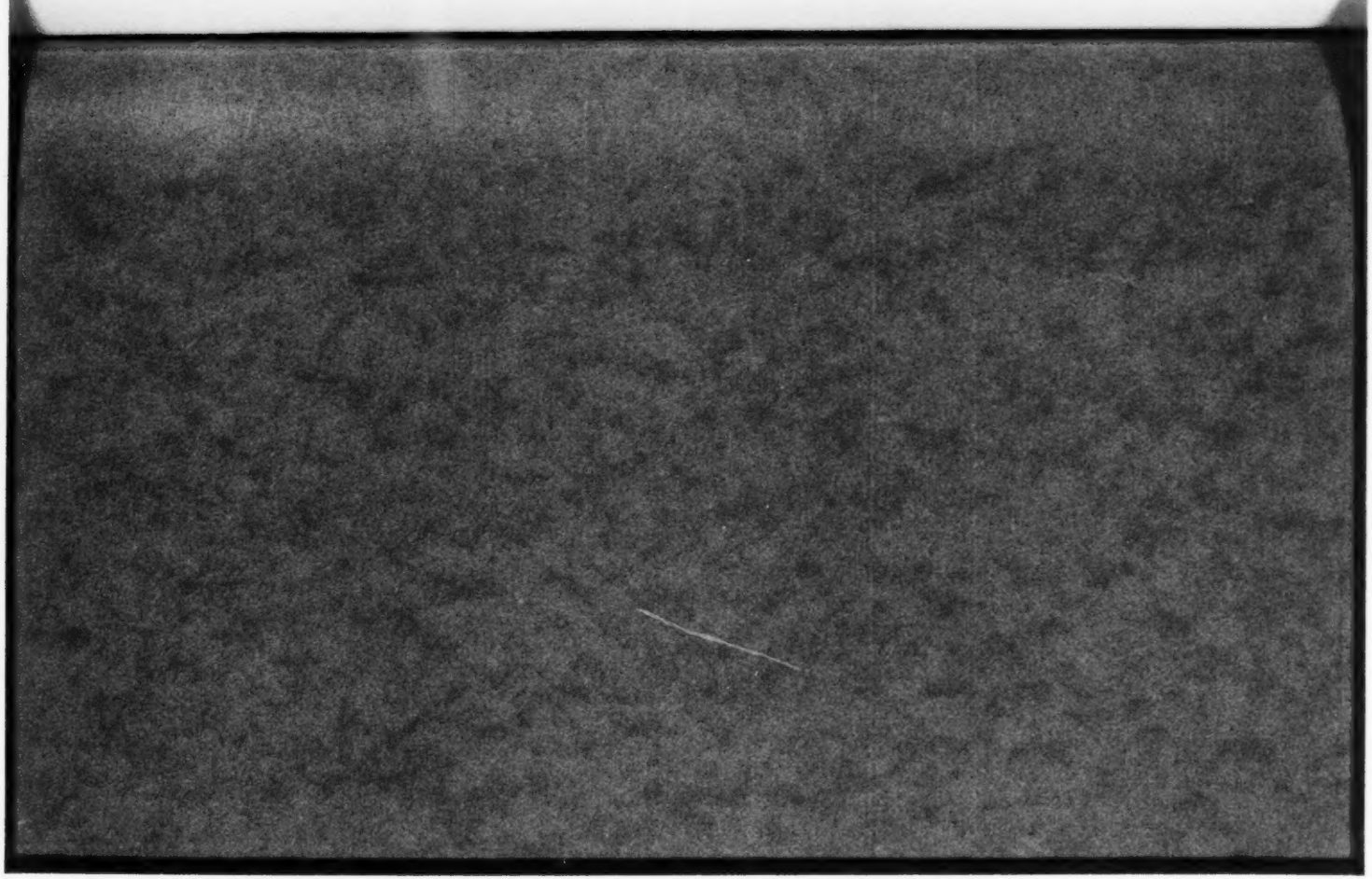

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 213

SOUTHERN PACIFIC COMPANY
(a corporation),
Petitioner,

vs.

GLADYS VIOLA HAIGHT,
Respondent.

BRIEF FOR RESPONDENT.

In this action for damages for negligence in the maintenance and operation of a railroad crossing and in the handling and operation of a train thereon the petition for writ of certiorari mistakes or mistates both matter and fact relied upon for reason that a writ should issue.

The facts are stated in the opinion of the Circuit Court of Appeals. (R. pp. 560-587.)

INACCURACIES OF THE STATEMENT UPON WHICH THE PETITION IS BASED.

At the time in question the crossing at which the accident occurred was unlighted and unmarked except for two unlighted wooden cross-arm signs, one on either side of the track and approached by the auto traveler only *after* he had encountered and negotiated the crossing; that to the south side of the highway and therefore on the right of the eastbound travel was located *east* of the railroad crossing and 14 feet removed from the south or right-hand edge of the highway (R. pp. 74; 92; 95); that on the north side of the highway was similarly located west of the railroad crossing and 14 feet removed from the north edge of the highway. (R. pp. 73 and 91.) The highway was 20 feet in width. The crossing sign that might be expected to be useful to the eastbound respondent or the driver of the machine in which she was a passenger was 23 feet removed from the center and side of the roadway upon which she traveled. (R. p. 91.) On both sides of the track the crossing signs were located in line with a string of power poles paralleling the highway at a distance of 20 feet and 23 feet from the center line thereof, which tended further to obscure the crossing signs even under the most favorable conditions of visibility. (R. pp. 92-93 and 94-95.)

In the petition (p. 4) the crossing sign to the west of the track and to the north of the highway being traversed by respondent in an easterly direction is mistakenly or inadvertently stated to have been 4 feet removed from the north edge of the highway, whereas petitioner's own engineer, Micander, who surveyed

the scene in the days following the accident, testified that this crossing sign was 23 feet from the center of the highway and 14 feet from the north edge of the highway. (R. pp. 73-74; 91.)

Among the issues submitted to the jury was the question whether the defendant Company had complied with General Order 75-A of the Railroad Commission of California which reads in part as follows:

> "Subdivision 5: (a) Each public crossing at grade of a road, highway or street with a track of a railroad * * * shall * * * be protected by at least one crossing sign, constructed and installed in substantial conformity with the specifications herein illustrated and designated as Standard No. 1, * * *
>
> "(b) Each crossing sign (Standard No. 1) herein illustrated shall be located in a conspicuous position facing highway travel, preferably at either corner of the crossing intersection of the right-hand side of the highway traffic flow and in advance of the railroad track."*

The decision of the Circuit Court of Appeals *does not,* as petitioner contends (Petition pp. 7-8), hold that to meet the Railroad Commission's requirement such crossing sign must under all circumstances be visible to travel approaching the track. The decision, applying the law as laid down by the latest decisions of the courts of California upon the subject, sustains

---

*NOTE: Violation of the order of the Railroad Commission constitutes negligence as a matter of law. *Morris v. Sierra and San Francisco Power Co.*, 57 Cal. App. 281, 207 Pac. 262.

the action of the District Court in submitting to the jury the question whether at 8:45 p. m. on March 6, 1935, at Dorris, California ("the time and place of the accident"), the crossing sign was located *in a conspicuous position facing highway travel* (R. p. 489), and follows the California rule that if the company has been negligent in failing to warn of the location of the crossing then the presence of a train across the highway may or may not be sufficient warning of danger according to the circumstances of the case. (R. p. 577.)

In response to the request of the petitioner, the District Court instructed the jury that the crew was not obliged to provide a flagman or other means of warning to travelers of the obstruction of the crossing by a train "in the absence of some unusual environment" (R. pp. 533; 490), and the court *did not,* as petitioner contends (Petition p. 5), instruct the jury that if the snowstorm required some sort of signal or warning a flagman was required. The charge was that negligence could not be predicated upon failure to regularly maintain any human or automatic flagman or mechanical signal, bell, light or gates, and expressly and in accordance with petitioner's request (ante) limited the consideration of the jury to such action on the part of the "agents in charge of the train" and "the crew" as in view of all the facts and circumstances existing at the time and place the exercise of ordinary care required. (R. p. 490.) In this respect the charge has the endorsement of both petitioner's request and the law of the State of California.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED.

(1) The petition is premised upon an erroneous statement of fact and a misinterpretation of the opinion of the Circuit Court and of the charge of the District Court as already pointed out.

(2) The decision of the Circuit Court of Appeals follows and applies the law of California as laid down in the latest of the decisions of the District Court of Appeal and as earlier settled by the Supreme Court of this State.

(3) It is settled by decision in California that whether wooden crossing signs located at a distance removed from the highway and beyond the track constitute a compliance with the minimum requirement of the Railroad Commission for location in a conspicuous position facing highway travel is a question of fact.

(4) It is the law in California that compliance with the minimum requirements of statute or order of the Railroad Commission is not the absolute test of negligence and does not necessarily relieve the railroad from the necessity of taking such additional precautions as ordinary care may require.

(5) It is settled by law in California that mere knowledge of the existence of a crossing will not excuse the railroad from the requirement to mark its location, particularly toward the passenger in a vehicle who under California law is under no positive duty to keep a lookout for obstructions upon the highway.

ARGUMENT.

Under the heading of "Inaccuracies of the Statement Upon Which the Petition is Based" it has already been shown that to command the attention of this Court the petitioner had taken unseemly liberties with both the record and opinion of the court below. When the record is correctly stated there is, of course, no escape from the application of the rule laid down in *Harper v. Northwestern Pacific Railroad Co.*, 34 Cal. App. (2d) 451, 93 Pac. (2d) 821, wherein it is stated:

> "* * * that a railroad track which is invisible on account of darkness or because it is otherwise concealed from view, is not a warning of danger, unless one knows just where to look for it."

The *Harper* case is the latest decision of the courts upon the subject and petitioner concedes there is nothing in the *Harper* case that is inconsistent or in conflict with the earlier decision of *Dunlap v. Pacific Elec. Ry. Co.*, 12 Cal. App. (2d) 473, 55 Pac. (2d) 894, wherein no question of the location of crossing signs was involved. Considered together the two cases would seem to lay down the rule as stated by the Circuit Court of Appeals that "where the railroad company has used due care to warn the public of the location of its railroad crossing, then an obstruction on the crossing is in itself notice of danger and the railroad company is not bound to give additional warning. But if the company has been negligent in failing to warn of the location of the crossing, then the presence of a train across an intersection might not be a sufficient warning of danger." (R. p. 577.)

Throughout its brief the petitioner proceeds upon the unwarranted assumption, repudiated by the evidence hereinbefore set forth, that the crossing sign was, as a matter of law, located in strict compliance with the minimum requirements of the Railroad Commission and hence it had discharged its entire duty under California law toward the traveling public. The Appellate Court held that the question of whether or not the crossing sign was located in a "conspicuous position" in compliance with the order of the Railroad Commission was a pure question of fact for the jury to determine; that this question was submitted to the jury "exactly as the defendant company contends it should have (been) done". (R. p. 580.)

With respect to petitioner's further assumption that it could not be held obliged to do more than install the unlighted crossing sign (regardless of its location) for the purpose of notifying travelers of the existence of the crossing, the Circuit Court of Appeals says:

> "Thus, if the defendant in the exercise of due care should have known that the cross-arm sign maintained by it would not be visible in a snowstorm not unusual to the vicinity, then it cannot rely on the maintenance of the cross-arm as a full discharge of its duty to warn the highway user of the presence of its railroad crossing and the danger incident thereto."
>
> 126 Fed. (2d) 900 at p. 908.

The foregoing, as announced by the Circuit Court of Appeals, is in complete accord with the California law as laid down by the courts of this State. In accord with the rule of the majority the California

courts have adhered to the doctrine that naked compliance with statute or order regulating the maintenance and operation at crossings is not the exclusive test of care or negligence. In California, as elsewhere, our courts have held that such regulations constitute only the minimum measure of care required of persons in charge of dangerous instrumentalities and that a railroad company, like any other, must in a proper case submit to the judgment of the jury the question of whether something more than the minimum of care was required under the facts and circumstances given in evidence.

In the case of *Bush v. Southern Pacific Co.*, 106 Cal. App. 101, 289 Pac. 190, the District Court of Appeal, in passing upon and approving an instruction in the same terms and to the same effect as the language of the charge and opinion here under attack, lays down the familiar rule that:

> " 'There are some authorities for the proposition that when a railroad company has followed the statutory directions as to giving signals, etc., it has discharged its whole duty in the premises, but the sounder doctrine is that the whole duty of a railroad company in respect of signaling the approach of its trains to highway crossings is not necessarily performed by a naked compliance with the statute in that behalf, and that such compliance does not necessarily relieve the railroad company from the necessity of taking such additional precautions as are essential to the safety of passers on the highway. * * * Neither the legislature nor the railroad commissioners can arbitrarily determine in advance what shall constitute

ordinary care or reasonable prudence in a railroad company at a crossing, but each case must stand upon its own merits and be decided upon its own facts and circumstances; and for this reason it is usually a question for the jury whether or not precautionary measures in addition to the ringing of the bell or the sounding of the whistle ought to have been adopted to prevent a collision, and whether under the circumstances of the case, the company used reasonable care.' (22 R. C. L. 998.)

'It is * * * held, in many of the states (in fact the rule is well-nigh, if not quite, universal) that a railroad company, under certain circumstances, will not be held free from negligence even though it may have complied literally with the terms of a statute prescribing certain signals to be given and other precautions to be taken by it for the safety of the traveling public at crossings. * * * The reason for such rulings is found in the principle of the common law that everybody must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way.' (*Grand Trunk R. Co. v. Ives,* 144 U. S. 408, 36 L. Ed. 485, 12 Sup. Ct. Rep. 679; see, also, *Panama R. R. Co. v. Pigott,* 254 U. S. 552, 60 A. L. R. 1096, 65 L. Ed. 400, 41 Sup. Ct. Rep. 199, see, also, *Rose's U. S. Notes & Supp.; Tisdale v. Panhandle & S. F. R. Co.* (Tex. Com. App.), 228 S. W. 133, 16 A. L. R. 1273.)

The instructions under consideration state a rule of daily application in negligence cases. * * * While the violation of a regulatory statute or ordinance constitutes negligence as a matter of

law, 'it does not follow that merely because one has complied with the terms of a statute or ordinance that he is thereby absolved from negligence'. (19 Cal. Jur. 634.) The great weight of authority is to the effect that statutory regulations constitute only the minimum measure of care required of persons in charge of dangerous instrumentalities, and a railroad company, equally with the driver of an automobile, must, in a proper case, submit to the judgment of a jury the question of whether something more than the minimum of care was required under the facts and circumstances given in evidence.

Considering the high speed of the train, the quietness of its approach and the difficulty of stopping it on the downgrade, the upgrade along the Otterbien Road to the crossing, the obstructed view from that road to the east and the position of the railroad cross-arms near the track and to the left of the road, it cannot be said as a matter of law that there is no evidence to which the instructions in question are applicable." (pp. 107-8.)

The decision in *Bush v. Southern Pacific Co.*, ante, is cited and followed in *Harper v. Northwestern Pac. R. Co.*, 34 Cal. App. (2d) 451, 93 Pac. (2d) 821, which in turn is cited and followed in the decision of the Circuit Court of Appeals in the instant case. In the case of *Hinkle v. Southern Pacific Co.*, 12 Cal. (2d) 691, 87 Pac. (2d) 349, the Supreme Court of the State of California adopts and follows the rule as announced in *Bush v. Southern Pacific Co.*, ante, with this to say:

> "When the instruction is read in its entirety, and not in segregated portions thereof, we think it is apparent that it contained a correct exposition of the law. The gist of the instruction was to the effect that although the railroad company was not required by statutory provisions, as a matter of law, to furnish certain warning devices at public crossings, such as red lanterns to its employees, automatic signaling devices, or any light on the forward end of the lead car in any switching movement within the yard limits, nevertheless, the absence of such statutory requirement did not relieve the defendant railroad company of its obligation to exercise reasonable care for the safety of travelers at crossings, and if an ordinarily prudent person would have supplied one or more of these warnings and the injury to respondents was a result of the failure by the railroad company to furnish and maintain one or more of such warnings, then the railroad company was guilty of negligence. This is substantially correct. (Bush v. Southern Pacific Co., 106 Cal. App. 101, 289 Pac. 190.)" (pp. 701-2.)

It may thus be seen that the conclusion arrived at by the Circuit Court of Appeals from the particular facts and circumstances in the instant case finds support in the decisions of both District Court of Appeal and Supreme Court of this State.

Finally, petitioner suggests in its brief that both Young, the host, and respondent were familiar with the fact that the highway in question crossed the railroad track in question, and it was therefore under no duty or obligation to warn them of the existence of the

railroad tracks. The answer to this contention is found in the *Harper* case (ante) to the effect that a railroad track "is not a warning of danger unless one knows just where to look for it. It is only when one observes or by the exercise of reasonable care should have observed a railroad track, or where one knows that it is in a particular place and identifies the locality that it becomes a warning of danger". Furthermore, in this connection, under California law, the respondent was under no duty and was not charged with responsibility for observing the condition of the traffic upon the highway and she was under no duty to exercise an oversight as to the way in which the automobile was to be operated or to keep a lookout for impending danger. The point is illustrated in *Murphy v. National Ice Cream Co.,* 114 Cal. App. 482, 300 Pac. 91, where the court instructed the jury that the plaintiff guest was not guilty of contributory negligence as a matter of law. This ruling was sustained on appeal and the court stated (p. 489):

> "Basing their contention on the driver's testimony, defendants argue that Mrs. Murphy must have seen the truck at the point designated by the driver, or that she could have seen it if she had looked; and that if she did see it, or could have seen it had she looked, she was guilty of contributory negligence in not warning Mrs. Howard of its approach. *We are unable to subscribe to such theory because Mrs. Murphy as a guest was not charged with the responsibility for observing the condition of the traffic upon the highway,* nor was there anything she could have done after the danger was imminent to avoid a collision." (Emphasis added.)

Malone v. Clemon, 111 Cal. App. 13, 205 Pac. 70, was an action by a guest against his host. The host was held guilty of gross negligence in running into the rear of a parked truck and it was held that it was not contributory negligence for the guest to be asleep at the time of the accident and thus not able to warn the host of the parked truck. The court stated (p. 19):

> "* * * there was no obligation on the part of the guest to exercise an oversight as to the way in which the automobile was to be operated or to keep a lookout for impending danger." (Hearing in Supreme Court denied.)

In closing the discussion in this matter, it may also be well to note that under California law the negligence, if any, of a host is not to be imputed to a guest.

Murphy v. National Ice Cream Co., ante;
Malone v. Clemon, ante.

We therefore respectfully submit that the petition for certiorari should be denied.

Dated, San Francisco, California,
August 19, 1942.

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